**JEYASAKTHY KUMARANAYAGAM**

**v.**

**KANDIAH CHANDRAKUMARAN**

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR VISU SINNADURAI J
[DIVORCE PETITION NO S4-33-128-1994]
27 JUNE 1996

***FAMILY LAW:*** *Divorce - Jurisdiction of Court to hear petition - Law Reform (Marriage and Divorce) Act 1976, ss 48, 49 & 52 - Domicile of both parties - Joint petition - Unilateral petition.*

***FAMILY LAW:*** *Divorce - Presence of petitioners in Court - Whether imperative - Reasons.*

***FAMILY LAW:*** *Divorce - Joint petition - Essential elements - Consent - Ancillary relief.*

***FAMILY LAW:*** *Divorce - Consent - Nature and requirement of consent in divorce petition - Absence of objections from a party - Whether sufficient.*

***FAMILY LAW:*** *Divorce - Petition for divorce - Whether joint petition can be converted into unilateral petition - Whether necessary to file afresh - Whether amendments necessary.*

This was a divorce petition which began as an uncontested joint petition. The parties were married in London in 1985. In 1991, the husband took up employment in Malaysia, and since then, they have lived in Malaysia. In 1994, they filed a joint petition for divorce in the High Court. Detailed financial provisions were made by the husband for the wife and the two children of the marriage therein; and it was also mutually agreed that the wife should have custody of the children with the husband having access to them.

On the date of the hearing, however, the husband, a British citizen, was not present in Court as he had left Malaysia for the UK, taking with him the two children of the marriage, without the knowledge of the wife, a Sri Lankan citizen. Counsel for the husband then filed a notice of withdrawal in respect of his consent to the joint petition. Subsequently, upon the application of the wife, the Court granted her an interim order for maintenance, and also for access to the children.

The primary issues that arose for decision centred on the following: (1) whether the Court had jurisdiction to hear the divorce petition, either as a joint petition or a unilateral petition; (2) if the Court had jurisdiction, the effect of the husband's revocation of his consent in respect of the joint petition; and (3)

whether a joint petition may be converted into a unilateral or contested petition upon the revocation of consent by one of the parties.

**Held:**

**[1]** The general jurisdiction of the High Court to entertain divorce petitions is provided for in s. 48 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). Section 49 of the Act confers additional jurisdiction upon the High Court in cases where the proceedings for divorce are commenced by a wife although the husband is not domiciled or resident in Malaysia.

**[2]** Section 48 of the Act provides that the Court has the power to make a decree of divorce only, *inter alia*, 'where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.' Thus, before any proceedings may be heard by the Court, it has to be satisfied that the domicile of both the parties was in Malaysia at the time the petition was presented.

**[3]** The requirement in s. 48 of the Act is equally applicable to a joint petition under s. 52 of the Act. In other words, even if a joint petition is filed by both spouses, the Court still has to be satisfied that both the parties were domiciled in Malaysia. In the instant case, neither parties to the marriage were domiciled in Malaysia at the time the petition was presented. Therefore, the Court had no jurisdiction to entertain the joint petition.

***Obiter:***

*(1) It is imperative for both petitioners to be present in Court, unless of course, their absence has been dispensed with by the Court on a special application being made to the Court prior to the hearing date.*

*(2) A joint petition must contain two elements, ie, the mutual consent of the parties to dissolve the marriage, and, the ancillary provisions relating to maintenance, custody, and the distribution of property. It cannot contain provisions for divorce only and none for ancillary relief, or vice-versa.*

*(3) Consent to a petition for divorce 'must continue to decree nisi and consequently must be a valid, subsisting consent when the case is heard. It must remain operative as the expression of the respondent's state of mind up to the moment when the decree is granted.' Even the absence of objections from one of the parties is insufficient.*

*(4) Once the basis for a joint petition ceases to exist, that is, the consent of both or either of the parties no longer exists, the petition lapses, and as such, if the other party wishes to proceed with the divorce, a unilateral petition has to be filed afresh, and all the other procedures applicable to such a unilateral petition has to be complied*

*with. Thus, a joint petition cannot be converted into a unilateral petition without any amendments being made to it.*

*[Petition dismissed.]*

**Cases referred to:**

*Saraswathy v. Palakrisnan [1986] 2 MLJ 127* ***(refd)***
*Tan Guan Hock v. Khor Chai Heoh [1990] 1 MLJ 422* ***(foll)***
*Melvin Lee Campbell v. Amy anak Edward Sumek [1988] 2 MLJ 338* ***(refd)***
*Marshall v. Marshall [1956] MLJ 122* ***(cit)***
*Rayner v. Rayner [1956] MLJ 179* ***(refd)***
*Sivanesan v. Shymala [1986] 1 MLJ 400* ***(cit)***
*Beales v. Beales [1972] 2 All ER 667* ***(refd)***
*Mahon v. Mahon [1971] 2 MLJ 266* ***(refd)***

**Legislation referred to:**

Law Reform (Marriage and Divorce) Act 1976, ss. 48, 49(1)(b), 77(1)(a), 88, 89, 106
Divorce Ordinance 1952
Divorce & Matrimonial Proceedings Rules 1980
Sarawak Matrimonial Causes Ordinance (Cap 94), s. 52

**Other sources referred to:**

*13 Halsbury's Laws of England,* 4th Edn., para 645

*For the wife/petitioner - Dr. M Thambirajah; M/s. Thambirajah & Associates*
*For the husband/petitioner - Balwant Singh Sidhu; M/s. Balwant Singh Sidhu & Co.*

## JUDGMENT

**Visu Sinnadurai J:**

This is one of those divorce cases which was acrimoneously contested by the parties. What began as an uncontested joint petition whereby the parties attempted to settle their matrimonial differences amicably, soon became fraught with animosity. The case, once again highlights the difficulties which some spouses confront in obtaining a divorce, or custody of their children.

As a consequence, the disposal of this petition has been a protracted one. From the time of the filing of the petition to the final disposal, several dramatic events took place which necessitated various applications being made by the husband or the wife: the wife initiated proceedings for divorce; subsequently a joint petition was filed; after the joint petition was filed, the husband revoked his consent; at the date fixed for the hearing of the application, the husband was not present in Court; whilst the proceedings was still before the Court, the husband left the country without the knowledge of the wife, taking with him the two children, a pair of twins, aged three; the wife, being left alone in Malaysia, and without any financial means, had to apply for an interim maintenance order; the wife's initial attempts to communicate with her husband and the children in England proved difficult, until the intervention of the Court

and the respective Counsel. The wife then left Malaysia for England; and finally, whilst these proceedings were still before the Court, the husband made certain applications to the English Court.

*Facts*

The husband, Kandiah Chandrakumaran, is a British citizen, whilst the wife, Jeyasakthy Kumaranayagam, is a Sri Lankan citizen. The parties were married in the Royal Borough of Kingston Upon Thames, London, on 23 February 1985. There are two children of the marriage, a pair of twins, aged three.

In July 1991, the husband took up employment as a surgeon/lecturer at the University of Malaya. Since that date, the spouses have lived in Malaysia.

During their stay in Malaysia, differences arose between the parties, and as a consequence the wife indicated to the husband that she wished to commence divorce proceedings.

In March 1994, the husband and the wife filed a joint petition in the High Court Kuala Lumpur that their marriage be dissolved and sought certain ancillary relief.

In the joint petition, detailed financial provisions were made by the husband for the wife and the children, namely the property in London to be sold and the proceeds of the sale to be used in a specified manner for the benefit of the wife and the children. As regard the care and custody of the children, it was mutually agreed that the wife should be granted custody of both the children and that the husband be granted access to them.

*The Hearing*

On 18 March 1994, just before the date fixed for the hearing of the joint petition, a certificate of urgency was filed for the hearing of an *ex parte* application for an injunction. In this summons-in-chambers (enclosure 5), filed by the wife, the wife sought an injunction to restrain the husband from removing the children from the care and custody of the wife and, secondly, an injunction to restrain the husband from receiving the gratuity which was payable by the University of Malaya to the husband. The wife also sought an order to restrain the husband from transferring out of the country the proceeds from the sale of a motor vehicle.

The hearing of this *ex parte* application was fixed for 24 March 1994. At this hearing, the Court pointed out to Dr. Thambirajah, who was on record as Counsel for both the petitioners in the joint petition, that as the summons-in-chambers for injunction was applied for by the wife alone, on an *ex parte* basis, a possible conflict of interest could arise if he continued to act for both parties. On the advice of the Court, which Dr. Thambirajah readily accepted, Dr. Thambirajah agreed that a different Counsel ought to be retained by the husband.

The Court also sought the assistance of Counsel as to whether the Court had the necessary jurisdiction to hear this *ex parte* application, as well as the power to hear the joint petition under the Law Reform (Marriage and Divorce) Act (the Act). At the request of Counsel, the matter was adjourned so as to enable Counsel to study this preliminary issue raised by the Court. A new date was then fixed for the hearing of the joint petition.

On 3 May 1994, Mr. Balwant Singh, appeared in Court and informed the Court that he was now acting for the husband and that the husband had now revoked his previous consent to the joint petition. The husband was, however, not present in Court, though he was informed of the hearing date. Dr. Thambirajah pointed out that without the husband's presence, nor an affidavit indicating that the husband was revoking his consent, there was no evidence before the Court as to the revocation of his consent to the joint petition. Mr. Balwant then informed the Court that he had just filed a notice of withdrawal of consent by the husband. As Dr. Thambirajah objected to this notice of withdrawal of consent being filed by Mr. Balwant, the matter was once again adjourned to another date to enable the husband to be present in Court.

It was only at this stage that the Court was informed that the husband had left the country and that he had also taken the two children with him. It was pointed out that the wife who was still in Kuala Lumpur by herself, had no means to support herself in Malaysia. It was argued by Dr. Thambirajah that under s. 77(l)(a) of the Act, the Court had the necessary power to order the husband to pay maintenance to the wife during the course of any matrimonial proceedings. It was further pointed out, that the Court had a similar power to order access to the mother of the children pending the outcome of the divorce proceedings.

As it appeared to the Court, that the application was made, *prima facie,* during the course of a matrimonial proceeding, and as that the justice of the case so demanded that such an order ought to be made, both in the interests of the wife and the children, the Court granted an interim order for maintenance and also for access by the wife to the children, even though at that stage the children were already in England, with liberty: see generally the Federal Court decision in *Saraswathy v. Palakrisnan* [1986] 2 MLJ 127, where the question as to whether the Courts have the powers to hear applications for custody or maintenance when there was no pending action for divorce was considered. The Court, however, made no other orders until Counsel had addressed the Court on the legal issues relating to the main petition itself.

On 24 May 1994, the matter, once again, came up for hearing. The Court was informed that the husband had left the country for good and had no intention of being present in Court as he had revoked his consent to the joint petition. Dr. Thambirajah, however, urged the Court to hear the joint petition, as the petition as it stood before the Court remained a joint petition, and that

the revocation of consent by the husband was either irrelevant or, even invalid. After lengthy arguments by Counsel for both parties, Counsel agreed, on a without prejudice basis to reach a compromise on the matter.

At the next hearing date, 8 June 1994, Counsel informed the Court that they were unable to reach any settlement. Dr. Thambirajah then, once again, urged the Court to hear the joint petition. Parties then agreed to submit written submission on the relevant questions of law.

*Issues*

The Court narrowed the following issues for consideration by Counsel:

(a) The jurisdiction of this Court to hear the joint application for divorce, either as a joint petition or a unilateral petition;

(b) If the Court had the jurisdiction, the effect of the revocation of the consent by the husband on the joint petition;

(c) Whether a joint petition, on the revocation of consent by one of the parties, may be converted into a unilateral or contested petition.

*Jurisdiction of Court*

As pointed earlier, the preliminary issue that the Court had to consider in this case was whether the Court had the jurisdiction to entertain this petition for divorce and the power to grant the divorce.

The general jurisdiction of the High Court to entertain divorce petitions is provided for in s. 48 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164). The said section reads as follows:

> Nothing in this Act shall authorise the Court to make any decree of divorce except:
>
> (a) where the marriage has been registered or deemed to be registered under this Act; or
>
> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
>
> (c) **where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.** (Emphasis added)

However, under certain circumstances, the High Court is conferred with additional jurisdiction. This is in cases where the proceedings for divorce are commenced by a wife, and not by a husband. This is provided for in s. 49 of the Act which provides as follows:

> Notwithstanding anything to the contrary in s. 48(1)(c), the Court shall have jurisdiction to entertain **procedings by a wife** under this part, although the husband is not domiciled or resident in Malaysia if:
>
> (a) the wife has been deserted by the husband, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or
>
> (b) **the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.** (Emphasis added)

*Domicile*

Section 48 of the Act provides that the Court has the power to make a decree of divorce only where, *inter alia*, "where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia". Therefore, before any proceedings may be heard by the Court, the Court has to satisfy itself that the domicile of both the parties was in Malaysia at the time the petition is presented. In the Supreme Court decision in *Tan Guan Hock v. Khor Chai Heoh* [1990] 1 MLJ 422, Gunn Chit Tuan SCJ (as he then was) observed (at page 424):

> ... The petitioner would still have to prove and satisfy the Court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the Court could exercise its powers under s. 48 of the Law Reform (Marriage and Divorce) Act to grant any relief to the parties.

Similarly Tan Thaw Chong J in *Melvin Lee Campbell v. Amy anak Edward Sumek* [1988] 2 MLJ 338, observed (at page 338):

> The provision of s. 48(l)(c) in my view requires that the Court must be satisfied that at the time when the petition in the instant case was presented, the domicile of both the petitioners was in Malaysia.

This requirement of s. 48 is equally applicable to a joint petition under s. 52 of the Act. In other words, even if a joint petition is filed by both spouses, the Court still has to be satisfied before hearing the matter, that both the parties were domiciled in Malaysia. Sufficient evidence, therefore, has to be adduced to establish the domicile of the parties. As to the burden of proof required to show a change of domicile, see for example, *Marshall v. Marshall* [1956,] MLJ 122, *Melvin Lee Campbell v. Amy anak Edward Sumek* [1988] 2 MLJ 338.

I do not propose to deal with all the cases dealing with the question of domicile for the purposes of obtaining matrimonial relief. The following cases from Malaysia and Singapore clearly state the law. In the early case of *Rayner v. Rayner* [1956] MLJ 179, Taylor J in distinguishing the earlier case of *Marshall v. Marshall* [1956] MLJ 122, held that the husband petitioner whose domicile

of origin was English, did not acquire a domicile of choice in Singapore, even though he had worked in Singapore and Selangor for a considerable period of time. In distinguishing *Marshall's* case, Taylor J observed at page 180:

> In *Marshall's* case, the petitioner-husband had the option of continuing in an employment which involved transfer to another State [of Malaysia], and probably further transfers, or of taking up a new appointment which meant remaining indefinitely in Singapore, he preferred the latter. This was a definite act of choice and in making it the dominant factor was his preference for Singapore as a place in which to reside.

In the more recent case of Melvin *Lee Campbell v. Amy anak Edward Sumek* [1988] 2 MLJ 338, the High Court in Kuching held that the husband, a foreigner, even though he had married a native of Sarawak and had lived in Malaysia since 1977 (for a period of over ten years before the joint petition for divorce was filed), and had intended to make Malaysia his permanent home, had failed to satisfy the Court that at the time of the filing of the joint petition his domicile was in Malaysia. As a consequence, the Court held that the Court had no jurisdiction to entertain the joint petition.

In the present case, it is clear from the facts that neither the husband nor the wife were domiciled in Malaysia at the time the petition was presented. As stated earlier, the husband is a British subject and the wife a Sri Lankan citizen. They were living in London from 1985 until July 1991 when the parties came to Malaysia. The husband was employed by the University for a fixed term of office. He was a holder of a work permit issued by the Malaysian Government. They owned no properties in Malaysia. The intention of the parties was to live in Malaysia only so long as husband was employed by the University. There was no intention to change their domicile, certainly not to Malaysia.

I therefore conclude that as the parties were not domiciled in Malaysia at the time the petition was presented, this Court clearly does not have the jurisdiction to entertain this petition.

In the light of the view that I have taken that the parties in the present case were not domiciled in Malaysia and that the High Court has no jurisdiction to hear the joint petition, the question of the effect of the revocation of the consent by the husband therefore becomes, strictly speaking, irrelevant for consideration. However, I wish to make certain observations on this issue.

*Divorce by Mutual Consent/Joint Petition*

Dissolution of a marriage by mutual consent was first introduced in most states of Malaysia when the Law Reform (Marriage and Divorce) Act 1976 was enacted. Contrary to popular belief, it is not based on existing English law, but on the Sarawak Matrimonial Causes Ordinance (Cap 94) which had been in force since 1932: see *Report of the Royal Commission on Non-Muslim*

*Marriage and Divorce Laws, Preliminary Report of the Joint Select Committee,* page 57. See also generally the Federal Court decision of *Sivanesan v. Shymala* [1986] 1 MLJ 400.

Section 52 of the Act provides as follows:

> If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the Court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit.

By virtue of this section, parties intending to dissolve their marriage by mutual consent need to present a joint petition. Such a joint petition, besides providing particulars of the parties, and details of their said marriage, must also contain the following: (a) that both parties freely consent to the dissolution of the marriage; (b) proper provisions have been made for the wife; and (c) provisions for the support, care and custody of the children, if any. It is often thought that once these arrangements have been provided for the wife and children, that arrangement must be given effect to by the Court. This view is certainly erroneous.

The Court on considering a joint petition has wide powers. Having satisfied itself that the consent of both the parties was freely given, the Court has to consider whether the arrangements made for the wife and children are proper. This the Court does, by considering the income of the parties, the division of matrimonial properties, and the welfare of the children. The Court, has the power to vary any of the provisions made by the parties, if in the light of the evidence before it, it deems such modifications to be necessary.

A joint petition therefore contains two aspects:

(i) the mutual consent of the parties to dissolve the marriage and (ii) the ancillary provisions relating to maintenance, custody and distribution of properties. In approving both these aspects, the Court has the discretion as to whether to approve it in totality, or with modifications. If it approves the first aspect, the Court grants a decree of divorce, and if it approves the second, the provisions made in the joint petition for ancillary relief become the order of the Court. The point that needs emphasis is that a joint petition must contain both these aspects. It cannot therefore contain provisions for divorce only and none for ancillary relief, and *vice-versa*. As Lee Hun Hoe CJ (Borneo) in *Sivanesan v. Shymala,* above observed at page 401:

> In other words, until the terms and conditions are settled and agreed to in the joint petition or amended joint petition the Court should never grant a decree of divorce by mutual consent which is completely different from other forms of divorce.

*Revocation of Consent*

The Court, before considering the joint petition must be satisfied that the consent of the parties had been freely given to the petition, and that neither party to the joint petition was pressured or coerced into agreeing to the joint petition. This the Court may do so, only if both the petitioners are present and by inquiring from both the petitioners in Court whether they still maintain their intention to proceed with the joint petition. It is not uncommon that from the time of the filing of the petition, to the hearing of the petition, several intervening events may have taken place such as to necessitate a modification to the terms of the joint petition as agreed to earlier by the spouses. In other cases, as in the present case, one party to the joint petition may have changed his or her mind to the joint petition, and may revoke his or her consent.

If in any case, the Court is of the view that the consent of one of the parties is not freely given, or that one of the parties has revoked his consent at the time of the hearing of the petition, the Court cannot proceed to hear the joint petition. In this regard, the English case of *Beales v. Beales* [1972] 2 All ER 667 is instructive. Though as pointed out earlier, there is no similar provision under English law for the presentation of a joint petition, English law does provide that if the parties had been separated for two years, a divorce may be granted if the other party consents to it. In interpreting the words, "consents to a decree being granted", the Court observed (at page 674):

> It has been argued that, once a petitioner receives the respondent's consent and proceeds with the petition, there is a binding agreement from which neither can resile, ... But, ... I do not accept the submission as sound in law ... [T]he 1969 Act provides that 'the respondent consents to a decree being granted'. This is a deliberate use of the present tense when 'has consented' could have been used. The only possible conclusion is that the consent must continue to decree nisi and consequently must be a valid, subsisting consent when the case is heard. It must remain operative as the expression of the respondent's state of mind up to the moment when the decree is granted.

I too, subscribe to the view that consent for purposes of a joint petition under s. 52 of our Act is a positive requirement. Even a mere absence of any objection by one of the parties would not suffice. See generally, *13 Halsbury's Laws of England*, 4th edition, paragraph 645.

*Presence of Parties at Joint Petition*

It is often thought by parties, and sometimes even by Counsel acting for them, that the agreement reached at by the parties in a joint petition is final, and that the subsequent Court proceedings is merely a formality. It is, therefore, not uncommon for Counsel acting for both petitioners to inform the Court that one of the petitioners is not present in Court on the date fixed for the hearing of the petition, and to urge the Court to grant the divorce, even in the absence of the other petitioner.

I am of the view that it is imperative for both petitioners to be present in Court, unless of course, their absence has been dispensed with by the Court on a special application being made to the Court prior to the hearing date. My reasons for holding such a view are as follows: First, as seen earlier, the Court must be satisfied that the consent of the parties had been freely given, and that the said consent of both the parties at the date of the hearing is still effective.

Secondly, a duty is imposed on the Courts by the Law Reform (Marriage and Divorce) Act to ensure that whatever terms which may have been agreed upon by the parties in the joint petition is fair to each of the parties, and more importantly to the welfare of the children (if any). The Court has full powers under the Act to vary any of the terms which in the opinion of the Court is not in the best interest of the wife or the children. In such situations, without the presence of the parties, the Court may find it difficult to vary any of the agreed terms. It must be borne in mind, that it is undesirable for the Courts to vary any of the terms without the concurrence of both the parties.

It is not uncommon practice for the same lawyer to act for both the spouses and to draft the joint petition on both their behalves. In some cases, one party may agree to these terms as drafted by the same lawyer without any other independent advice. The need for the parties to fully understand their rights and obligations, especially relating to matrimonial property, financial arrangements and the arrangement for the children is important. It is generally an accepted principle that children should not be separated from one another, and yet in many joint petitions, provisions are made for the "distribution" of the children between the spouses without any consideration of their welfare. In such cases, it is important that the Judge considers in detail these provisions, and be satisfied that in the best interest of the children, particularly their welfare, the agreed arrangement between the parties for the children are acceptable: see generally ss. 88 and 89 of the Act.

If the Court is not satisfied with the arrangement made for the wife or the children, the Court has the full powers to vary these terms. This point was highlighted by the Federal Court in the case of *Sivanesan v. Shymala,* above, at page 404:

> There [is] nothing to prevent the learned Judge from attaching other terms or conditions to the decree if he deemed it fit. But usually before he did so he would explain to the spouses and obtain their consent.

But if any one of the spouses is absent, in his or her absence, it would be difficult for the Court to determine what is the best arrangement for the children.

Thirdly, all matrimonial proceedings are in open Court. It is a fundamental principle that the parties to any hearing in open Court ought to be present at the hearing proper. A joint petition for divorce is no exception as far as this principle is concerned. Whilst joint petitioners may have the benefit and convenience of saving the parties the embarrassment of stating their matrimonial differences in public, it does not reduce the entire proceedings to the level of a consent order or a mere contractual arrangement. Neither are the Courts in matrimonial proceedings, reduced to perform mere mechanical functions. On the contrary, a heavy social responsibility is placed on the Judges. This is one of the reasons why a joint petition must be heard in open Court only by a High Court Judge, and not the Registrar or a subordinate Court Judge.

The need for both the parties to be present at the hearing date was also emphasised by the Federal Court in the case of *Sivanesan v. Shymala* [1986] 1 MLJ 400. In this case, Lee Hun Hoe CJ, in delivering the judgment of the Federal Court discussed the principles of law applicable to divorce on the grounds of mutual consent under the Law Reform (Marriage and Divorce) Act, 1976. His Lordship said (at page 402):

> ... petitioners must appear in Court for the Court may wish to satisfy itself by questioning them as to whether they freely consent to the dissolution of their marriage and whether the provision for the wife and for the support, care and custody of the children, if any, are fair and reasonable. It may, after questioning, even attach other conditions if it thinks fit.

*Conversion of a Joint Petition to a Unilateral Petition*

Dr. Thambirajah, on behalf of the wife petitioner has argued that even if the High Court had no jurisdiction to hear the joint petition and that if the consent of the husband to the joint petition had been validly withdrawn, this Court still had the jurisdiction to hear the existing petition as presented on the basis that it was a unilateral petition by the wife under s. 49 of the Act. It is said that a party to a divorce should not be prejudiced merely because the other has revoked his or her consent. So long as the first party wishes to pursue with the application, for divorce, the mere non-compliance of the procedural aspects of the application ought not to be fatal and the Court should proceed to hear the original joint petition as though it was now a unilateral petition.

I am, however, of the view that once the basis for the joint petition ceases to exist, that is, the consent of both, or either of the parties no longer exists, the petition lapses and as such if the other party wishes to proceed with the divorce, a unilateral petition has to be filed afresh, and all other procedures applicable to such unilateral petition has to be complied with. Amongst these procedures are service of the petition on the other party, reference to the conciliatory body under s. 106 of the Act, and the other rules prescribed by the Divorce and Matrimonial Proceedings Rules 1980.

Though, as a general rule, the non-compliance of certain procedural aspects of a divorce proceeding ought not work to the prejudice of the parties, there are, however, certain procedures, especially those relating to service, which ought to be strictly complied with. It is also for this reason that a joint petition cannot be converted into a unilateral petition without any amendments being made to it.

*Unilateral Petition Wife Under Section 49*

In the present case, even assuming that the original joint petition, on the revocation of the consent by the husband, can be deemed to be a petition by the wife under s. 49, it is still necessary to consider whether certain of the prerequisites have been fulfilled by the wife before the Court can assume jurisdiction.

Section 49 is an exception to the general rule that only parties who are domiciled Malaysia may file a petition, be it contested or joint, for divorce. However, this exception applies only in cases where the petition is filed by a wife (and not by a husband). A wife may apply for a divorce under s. 49 under any one of the following circumstances:

(i) where the wife has been deserted by the husband, subject to the requirement that the husband was domiciled in Malaysia before his desertion: s. 49(l)(a); or

(ii) where the husband had been deported from Malaysia, again subject to the requirement that the husband was domiciled in Malaysia before his deportation: s. 49(l)(a); or

(iii) where the wife is resident in Malaysia and that she had been ordinarily resident in Malaysia for two years immediately preceding the commencement of the proceedings.

Generally, situations (i) and (ii) would apply to cases where a woman is married to a foreigner husband, and the couple have lived in Malaysia before the husband's desertion or deportation. On the other hand, situation (iii) will apply to cases where the woman is married to either a Malaysian or a foreign man, and the couple had lived abroad after the marriage. If the marriage breaks down, and as a consequence, the wife returns to Malaysia, she may then file proceedings for divorce after residing in Malaysia for two years.

It will therefore be seen that, s. 49, generally applies to cases where, the spouses were residing in Malaysia after the marriage and subsequently, the husband leaves the wife and goes abroad, or to cases where the spouses have lived abroad, and after the breakup of the marriage, the husband refuses to return to Malaysia to enable the wife to file divorce proceedings. In such cases, the wife will have difficulty in locating the husband, or the husband may refuse

to participate in any divorce proceedings. Section 49 applies therefore to overcome these hardships which may be caused to a wife.

Of course, s. 49 is wide enough to cover other situations as well. It is therefore argued on behalf of the wife petitioner that, this Court has the jurisdiction to hear the wife's petition under s. 49(l)(b) as she has been a resident in Malaysia for well over two years. It is further argued by Counsel for the wife petitioner, that no question of domicile of either of the parties (be it that of the husband or the wife) arises for consideration for a divorce filed by a wife under s. 49(l)(b).

There appears to be some merit in Counsel's argument. Generally, as pointed out earlier, a wife who has been "ordinarily resident" in Malaysia for two years, may file a petition for divorce under this section. As to the meaning of "ordinarily resident", see the Federal Court decision in *Mahon v. Mahon* [1971] 2 MLJ 266, where the Federal Court considered the scope of a similar provision under the then Divorce Ordinance 1952. Though s. 49 may be applicable to the present case, there is still the problem of whether a proper petition is before the Court. The petition before this Court is still in the original form, that is, as a joint petition, though now without the consent of the husband. Even that petition is without any consequential amendments being made to it. At this stage, there is no application made by the wife petitioner for any such amendments. What needs to be done first, before this Court can consider the wife's petition for divorce under s. 49(l)(b) is for a proper petition to be filed. Only then, can the Court consider the wife's application for divorce under s. 49(1)(b). In the absence of a fresh petition, I therefore, feel constrained in exercising this jurisdiction.

*Conclusion*

In this case, a petition was presented before a Malaysian Court to dissolve a marriage registered in England. This feature by itself is not uncommon. What is unusual is the fact that the parties to this divorce proceedings are a British citizen and a Sri Lankan citizen. Though the parties lived in Malaysia, neither are domiciled in Malaysia. These facts raise interesting issues relating to conflict of laws: Does the Malaysian Court have jurisdiction to grant a divorce under such circumstances? Will such a decree, if granted, be recognised in England? And if not, in which country should the wife file the proceedings, in Malaysia, England or Sri Lanka?

I have merely decided upon one issue, that is that this Court has no jurisdiction to grant a divorce based on the petition as presented to this Court. For reasons spelt out in my judgment, I have dismissed this application. I am fully aware that this decision may appear to be harsh on the wife-petitioner, but, unfortunately for the wife, based on the existing laws, this is the only conclusion I can arrive at.

Reported by Gan Peng Chiang